Supreme Court
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Old Vail Partners,

Petitioner,

v.

County of Riverside; City of Temecula,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of *Younger v. Harris*, *401 U.S. 37, 91 S.Ct. 746 (1971)*, rather than *Railroad Commission of Texas v. Pullman Co.*, *312 U.S. 496, 61 S.Ct. 643 (1941)*, to a California inverse condemnation litigant, filing concurrent state and federal actions, improperly forecloses, in violation of the Fifth Amendment to the U.S. Constitution, that litigant's access to the federal courts for the adjudication of a civil rights claim under 42 U.S.C. §§1983, 1985.

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Petitioner, Old Vail Partners (hereinafter "Old Vail"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on March 10, 1997.

OPINIONS BELOW

Neither the opinion of the District or Appellate Court is certified for publication.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered judgment against Old Vail on February 10, 1997. Old Vail filed a petition for rehearing on February 21, 1997. The Ninth Circuit Court of Appeals denied Old Vail's petition for rehearing on March 10, 1997. This Court has jurisdiction to review the judgment of the court of appeals pursuant to *28 U.S.C. §1254(1)*.

STATEMENT OF THE CASE

The Municipal Improvement Act of 1913 establishes the statutory framework for California municipal corporations to finance the construction of public improvements by authorizing the special assessment of improved property in direct proportion to the special benefit bestowed thereon by an increased infrastructure. In this regard, the special assessment differs substantially from a tax in that a tax can be levied "without reference to peculiar benefits to particular individuals or property." (*Fenton v. City of Delano (1984) 162 Cal.App.3d 400, 405, 208 Cal.Rptr. 486*; compare, *Harrison v. Board of Supervisors of City of San Mateo (1975) 44 Cal.App.3d 852, 857, 118 Cal.Rptr. 828* [recognizing that a mere "general benefit" inuring to the public as a whole will not justify a special assessment].)

In June of 1988, the County of Riverside adopted Resolution of Intention No. 88-139, pursuant to the Municipal Improvement Act of 1913,[1] to create Special Assessment District No. 159 (hereinafter "AD 159") for the purpose of financing public improvements under the Improvement Bond Act of 1915.

On July 8, 1988, the County filed a Notice of Assessment in the Official Records, thereby, creating liens against all real property located within AD 159 for the purpose of securing repayment of the municipal improvement bonds issued to the public. The liens constitute public record and have priority over all later recorded interests. If a property

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[1]California Streets and Highways Code §10000 et seq. All statutory references shall refer to the California code, unless specifically designated otherwise.

owner defaults on the assessments, the County, pursuant to the bond issuance agreement, will foreclose upon his property to satisfy the assessment deficiency.

The subject Property is located within AD 159 and, therefore, subject to special assessment. Payment of these assessments constitutes a substantial, continuous fiscal obligation well into the next century. In accordance with California law, however, these "Commercial" assessments properly reflect the County of Riverside's contemplated "Commercial" use of the Property. (see, *Dawson v. Town of Los Altos Hills (1976) 10 Cal.3d 676, 129 Cal.Rptr. 97.*)

On November 21, 1989, Old Vail, in direct reliance upon the then existing "Commercial" assessments and corresponding "Commercial" zoning ordinance, purchased a 39.8 Acre parcel.

On or about December 1, 1989, the City of Temecula incorporated as a city and, thereby, annexed the properties within AD 159 into its municipal boundaries. On or about November 7, 1993, the City of Temecula further adopted a General Plan designating Old Vail's Property as "Professional Office" use rather than "Commercial" use. "Professional Office" use is a substantially more restricted use than "Commercial" use.

The City of Temecula's down-zoning of the Property completely destroyed the economic viability of the Property by prohibiting the minimum land use necessary to satisfy the special assessments levied by the County of Riverside. Old Vail filed suit in the U.S. District Court for the Central District of California and Superior Court of the State of California for the County of Riverside alleging, inter

alia, a taking in violation of the United States and California Constitutions.

Jurisdiction of the U.S. District Court, Central District of California was proper under *42 U.S.C. §§1983, 1985*.

On or about October 17, 1994, Old Vail requested the U.S. District Court, Central District of California to abstain under *Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 642 (1941)*, via citation to *Furey v. City of Sacramento, 592 F.Supp. 463 (E.D. Cal. 1984)*.

On or about November 9, 1994, the federal district court dismissed Old Vail's complaint as: (1) barred by the Tax Injunction Act *(28 U.S.C. §1341)*; (2) failure to adequately allege a taking in violation of the Fifth Amendment; and (3) failure to state a claim upon which relief can be granted. *(FRCP 12(b)(6))*. Old Vail appealed.

On February 10, 1997, the United States Court of Appeals for the Ninth Circuit entered judgment vacating the judgment of the U.S. District Court and abstaining from jurisdiction under *Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)*. The United States Court of Appeals for the Ninth Circuit assumed subject matter jurisdiction for purposes of abstention. (See, *United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996)*.)

On February 21, 1997, Old Vail filed a petition for rehearing with the Ninth Circuit Court of Appeals requesting the Court to abstain under *Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 642 (1941)* rather than *Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)*.

On March 10, 1997, the Ninth Circuit Court of Appeals denied Old Vail's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW.

This case raises the significant issue of whether Younger abstention effectively forecloses a California inverse condemnation litigant from ever having its takings claims adjudicated within a federal forum. (*Younger v. Harris, 401 U.S. 37, 91 S.Ct. 1911 (1971)*; see also, *Beltran v. California, 871 F.2d 777, 782-83 (9th Cir. 1989).*)

The preclusionary effects of Younger abstention in the inverse condemnation arena necessarily arise from the interrelationship between the ripeness requirements of *42 U.S.C. §1983* and the California statutes of limitations soverning with inverse condemnation claims. To illustrate, the Ninth Circuit has held that a property owner must first exhaust his state inverse condemnation remedies prior to

instituting an action in federal court. (*Jones Intercable v. City of Chula Vista, 80 F.3d at 324 (9th Cir. 1996)* [observing that a California plaintiff's federal takings claim will not ripen until the party has first sought compensation through California's inverse condemnation proceedings].) California legislators, on the other hand, have determined that inverse condemnation claims shall be governed by all applicable California statutes of limitations. *(Government Code §945.8.)*

Old Vail must file its complaint within the prescribed statutory period. (See, e.g., *Government Code §65009(c)* [90 day statute of limitations pertaining action on a general plan].) Old Vail must, therefore, file a complaint in both state and federal court if it desires to preserve separate forums for the adjudication of distinct constitutional rights.

The application of Younger abstention to a California inverse condemnation litigant effectively precludes it from preserving separate forums for the adjudication of distinct constitutional claims by requiring the litigant to either: (1) file a single complaint in the state court, thereby abandoning its right to a federal forum, via the lapsing of the statute of limitations; or (2) file a complaint in both state and federal court, thereby evoking the prescripts of *Younger*. (*Beltran v. California, 871 F.2d at 782-83.*) Under either alternative, a California inverse condemnation litigant cannot satisfy the requisite conditions necessary to maintain an inverse condemnation action within a federal forum. (See e.g., *Furey v. City of Sacramento, 592 F.Supp. 463, 466 (E.D. Cal. 1984).*)

II. THE INVOCATION OF THE YOUNGER DOCTRINE CONFLICTS WITH PRECEDENT OF THE NINTH CIRCUIT.

The Ninth Circuit has in multiple land use/inverse condemnation cases approved a district court's decision to employ Pullman abstention. (*Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996; Bank of America Nat. T. & S. v. Summerland City Water Dist., 767 F.2d 544 (9th Cir. 1985); Pearl Investment Co. v. City and County of San Francisco, 774 F.2d 1460 (9th Cir. 1985); Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984); Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979); Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).*)

In *Furey v. City of Sacramento, 592 F.Supp. 463 (1984)*, plaintiff and other adjacent landowners signed a petition requesting the formation of a assessment

district in order to finance a sewer system. The City of Sacramento formed a special assessment district and installed a sewer system. The cost of the construction was allocated among the land owners in the district. After the assessment of Furey's property, the City of Sacramento rezoned Furey's property to Agriculture-Open Space, thereby effectively depriving Furey of any benefit of the sewer system. Furey filed a complaint in both state and federal court against the City of Sacramento for inverse condemnation.

The federal district court, by order of October 9, 1974, abstained under the Pullman doctrine pending a resolution of those claims raised in the Superior Court of California. (Id. 592 F.Supp. at 466.) Following resolution of Furey's state claims, the federal district court reassumed jurisdiction

and proceeded to adjudicate the merits of Furey's federal claims. (See, *Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986).*)[2]

In *Sinclair Oil Corp. v. County of Santa Barbara*, Sinclair Oil Corp. filed an action in state and federal court against the County of Santa Barbara alleging, inter alia, that the County's designation of its land as environmentally sensitive habitat effected a taking in violation of the California and U.S. Constitutions.

The district court dismissed four of Sinclair's five causes of action as unripe. The district court further dismissed the remaining claim, the petition for writ of mandate.

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[2]In accordance with Furey v. City of Sacramento, Old Vail filed both state and federal complaints.

The Ninth Circuit, overruled the district courts dismissal of Sinclair's petition for writ of mandate, holding that the district court should have refrained from addressing the claim under the reasoning of *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941).*

It is proper to abstain under *Pullman* in order to prevent the forfeiture of a California inverse condemnation litigant's federal claims. To illustrate, the district court's invocation of Pullman abstention in *Furey* predated the U.S. Supreme Court *Pennzoil* and Ninth Circuit *Beltran* decisions. (See, *Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519, 48 U.S. 1 (1987).*) The Ninth Circuit *Furey* Court was, thus, not required to address the paradoxical dilemma created by the application of Younger abstention to inverse condemnation cases filed concurrently by

a single plaintiff in state and federal court. In *Sinclair*, by contrast, the Ninth Circuit was able to avert the adverse ramifications of *Younger* by reasoning that the previously filed state court action did not request damages or "just compensation". (*Sinclair Oil Corp. v. County of Santa Barbara*, *96 F.3d at 404 n.1.*)

The Ninth Circuit's prior precedent suggests that the application of *Younger* may be avoided by initially filing an inverse condemnation action only in federal court; thereby actuating Pullman abstention, rather than Younger abstention. (See, *Beltran v. State of California*, *871 F.2d at 782* [opining that the critical question is not whether the state proceedings are still ongoing, but whether the state proceedings were underway before

initiation of the federal proceedings][3].) The narrow statute of limitations pertaining to inverse condemnation actions, however, may continue to run while the action is pending in federal court. If the statute expires prior to the federal court abstaining under Pullman, the plaintiff will be barred from initiating his state court action.

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[3] In accordance with Beltran v. State of California, Old Vail filed its federal complaint prior to the state complaint. Both complaints, however, were filed on the same day.

III. THE BREADTH OF THE LANGUAGE EMPLOYED BY THE YOUNGER AND PULLMAN ABSTENTION DOCTRINES FACILITATES UNEQUAL TREATMENT OF SIMILARLY SITUATED INVERSE CONDEMNATION LITIGANTS.

The criteria for implementation of either Younger or Pullman abstention effectively authorizes the ad hoc and inconsistent employment of these abstention doctrines. To illustrate, Younger abstention is considered appropriate where "(1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." (*Fresh Int's Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986).*)

Pullman abstention, by contrast, is properly invoked where: (1) the complaint touches a sensitive area of

social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) the possible determinative issue of state law is doubtful. (*Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974).*)

The breadth of the language employed by these abstention doctrines renders the analysis thereunder interchangeable.

A. Abstention Under The Younger Doctrine Is Inapposite To Prior Holdings Of The Ninth Circuit.

The Ninth Circuit determined Younger abstention to be applicable to Old Vail based upon a finding that: (1) Appellant's parallel state action was filed on the same day as the federal

complaint and is currently on appeal, *Fresh Int's Corp. v. Agricultural Labor Relations Bd.*, *805 F.2d at 1358*; (2) "land use planning is a sensitive area of social policy," *Sinclair Oil Corp. V. County of Santa Barbara*, *96 F.3d at 409*, that implicates a "substantial" state interest, *Mission Oaks Mobile Home Park v. City of Hollister*, *989 F.2d 359, 361 (9th Cir. 1993)*; and (3) California state courts afford appellant "an adequate opportunity" to raise federal takings claims. (Id.)

The juristic rational employed by the Ninth Circuit to support its invocation of Younger abstention has been utilized to justify the implementation of Pullman abstention. For instance, in *Santa Fe Land Improvement Co. v. City of Chula Vista*, *596 F.2d 838 (9th Cir. 1979)*, owners of unimproved real estate originally purchased for industrial usage brought

an action for, inter alia, inverse condemnation against the City of Chula Vista for rezoning the real estate to marsh preserve. The trial court abstained from jurisdiction under the Burford doctrine; thereby dismissing the action without prejudice. (See, *Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943).*) The Ninth Circuit affirmed the decision to abstain but reversed the invocation of Burford abstention holding Pullman abstention to be appropriate.

The Ninth Circuit justified the evocation of the Pullman doctrine by finding: (1) "land-use planning is today a sensitive area of social policy" (quoting, *Rancho Palos Verdes v. City of Laguna Beach, 547 F.2d 1092, 1094-1095 (9th Cir. 1976)*; (2) there are state policies and questions which may obviate the need to reach the federal questions; (3) whether a city has abused its zoning

discretion "is by nature a question turning on the peculiar facts of each case" (*Sederquist v. City of Tiburon, 590 F.2d 278, 282 (9th Cir. 1978).*)

The legal and factual correlation between *Santa Fe Land Improvement Co.* and Old Vail necessitates a similar disposition of the cases. In both cases, the choice of abstention doctrine is critical to the continued viability of the litigants federal inverse condemnation claims. Moreover, in both *Santa Fe Land Improvement Co.* and Old Vail, the Ninth Circuit employed comparable legal logic, but arrived at antithetical conclusions. Intervention by the U.S. Supreme Court is, therefore, necessary to accurately articulate the standards for implementation of the federal abstention doctrines in order to prevent the disparate treatment of similarly situated inverse condemnation litigants.

B. Pullman Abstention Is Proper.

Old Vail's federal inverse condemnation claims satisfy the prerequisites necessary for invocation of Pullman Abstention. To demonstrate, Old Vail's complaint unequivocally touches and concerns a sensitive area of social policy. (*Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9th Cir. 1984)* ["land use planning is a sensitive area of social policy that meets the first requirement for Pullman abstention"]; see also, *Sinclair Oil Corp v. County of Santa Barbara, 93 F.3d at 409 [quoting Kollsman].*)

A definitive ruling on Old Vail's state issues may terminate the controversy. (*Sederquist v. City of Tiburon, 590 F.2d at 282.)* For instance, if the California courts provide just compensation for a taking under state law, it might become unnecessary to address Old Vail's

federal takings claim. (*Sinclair Oil Corp. v. County of Santa Barbara*, *96 F.3d at 409.*) Even if adjudication of the state claim does not avert the need for adjudicating the federal constitutional issues, it is sufficient for *Pullman* purposes that it may narrow the federal constitutional questions. (*Pearl Inv. Co. v. City & County of San Francisco*, *774 F.2d at 1464.*)

Old Vail's state law issues are uncertain. (See, *Pearl Inv. Co. v. City & County of San Francisco*, *774 F.2d at 1465* [recognizing that uncertainty for purposes of Pullman abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law].) Old Vail's taking claim does not involve interpretation of an single legislative enactment. Instead, the taking claim involves the synergistic effects of the County of Riverside

specially assessing Old Vail's Property at a commercial rate while the City of Temecula down-zoned the Property from "Commercial" to "Office Professional" use; thereby destroying the Property's economic viability. The combined consequences of the County of Riverside and City of Temecula's actions involves an uncertain and uncharted area of state law warranting Pullman Abstention. (See, *Georgevich v. Strauss, 772 F.2d 1078, 1091 (3rd Cir. 1985)* ([recognizing that juxtaposition of otherwise clear statutes can create an independent ambiguity authorizing Pullman abstention].)

IV. Younger Abstention Is Improper.

The juristic purpose of Younger abstention is to prevent the utilization of the federal judicial system to either impede or obstruct a state's independent power of adjudication. (See, *Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct.*

1200 (1975); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211 (1977); Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911 (1977); Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515 (1982); Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718 (1986); Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519, 48 U.S. 1 (1987).)

The U.S. Supreme Court has never explicitly sanctioned the employment of Younger abstention in those circumstances where: (1) the federal plaintiff and state plaintiff are identical; and (2) the federal action does not attempt to either restrain or prevent the state action.

The Sixth Circuit Court of Appeals has held *Younger* abstention to be inapplicable if: (1) the federal plaintiff and state plaintiff are

identical; and (2) the federal action does not attempt to forestall or circumvent the state action. (*Crawley v. Hamilton County Commissioners, 744 F.2d 28 (6th Cir. 1984).*)

In *Crawley*, jail inmates brought suit in federal and state court against county officials challenging the conditions of their confinement. The district court dismissed the inmates' action under *Younger* and the "judicial economy" doctrine enunciated in *Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976).* The inmates appealed.

The Sixth Circuit overruled the district court's employment of Younger abstention on the grounds that *Younger* is inapplicable where the federal plaintiffs are also the state plaintiffs and the federal action does not attempt to impair or impede the state action. (Id. 744 F.2d at 30.)

The Ninth Circuit has explicitly recognized the propriety of the *Crawley* holding limiting the applicability of *Younger* to those cases wherein a federal action is instituted to impede or impair a corollary state action. (*Fresh Int'l Corp. v. Agricultural Labor Relations Board*, *805 F.2d at 1360, fn. 8* [acknowledging the validity of *Crawley* but distinguishing *Fresh* on the grounds that the federal suit was not voluntarily filed by Plaintiff].)

Younger is inapposite to the instant case as Old Vail is both the state and federal plaintiff and the federal action does not attempt to contravene or undermine the correlative state action.

V. YOUNGER ABSTENTION FORECLOSES AN INVERSE CONDEMNATION LITIGANT'S ACCESS TO THE FEDERAL COURTS.

Considerations of judicial economy and federalism justifiably require a

federal court to exercise restraint in deciding whether to adjudicate a civil rights action when a civil suit concerning the same basic dispute is pending in state court. Nevertheless, those considerations are not compelling enough to justify the complete subversion of the federal courts' role as the primary vindicators of federal civil rights, much less to motivate the virtual abdication of the federal courts' statutory responsibility in civil rights cases.

In approaching civil comity cases, federal courts must exercise considerable discretion in defending the federal rights of the litigants without unduly infringing upon the judicial sovereignty of the independent states. The Pullman doctrine represents the most utilitarian approach to resolving the conflicts of comity raised by inverse condemnation litigants pursuing distinct

constitutional rights in separate forums. Under Pullman abstention, the federal court respects the state's right to decide those issues pertinent to its internal affairs by reserving its jurisdiction pending a final determination of those claims raised in the state court proceedings. The federal court further minimizes conflicts of comity by having the federal issues obviated or, at least, narrowed by the state court proceedings. Finally, Pullman abstention guards the federal rights of the inverse condemnation litigant by preserving his right to a federal forum for adjudication of his federal claims.

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CONCLUSION

Old Vail requests the Court to grant this petition for certiorari.

Dated: July 2, 1997

DETISCH & CHRISTENSEN

By: _____
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Attorneys for Petitioner

APPENDIX A

Filed 03-10-97

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

OLD VAIL PARTNERS,	No. 96-55238
Plaintiff-Appellant,	D.C. No. CV-94-06309-CBM
v.	
COUNTY OF RIVERSIDE; CITY OF TEMECULA,	
Defendants-Appellees.	ORDER

Before: **BEEZER** and **KOZINSKI**, Circuit Judges, and **SHUBB***, District Judge.

Appellant's petition for rehearing is **DENIED**.

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* The Honorable William B. Schubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX B

Filed 02-10-97

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

OLD VAIL PARTNERS,	No. 96-55238
Plaintiff-Appellant,	D.C. No. CV-94-06309-CBM
v.	
COUNTY OF RIVERSIDE; CITY OF TEMECULA,	
Defendants-Appellees.	MEMORANDUM

Appeal from the United States District Court for the Central District of California Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted February 3, 1997
Pasadena, California

Before: **BEEZER** and **KOZINSKI**, Circuit Judges, and **SHUBB****, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the court of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable William B. Schubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

In addition to this federal action, appellant is pursuing identical claims against defendants in California state court. Because we are bound by "a strong federal policy against federal-court interference with pending state judicial proceedings," Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359, 360 (9th Cir.) 1993) (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)), cert. denied, 510 U.S. 1110 (1994), appellant's complaint must be dismissed. [1]/

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[1]/ The district court concluded that it was barred by the Tax Injunction Act, 28 U.S.C. §1341. Because resolving the case on abstention grounds is considerably easier than deciding this question, and because it will not affect the outcome of the case, we assume that we have subject matter jurisdiction. See United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

Younger abstention is appropriate where "(1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986). Each of these criteria is met: Appellant's parallel state action was filed on the same day as the federal complaint and is currently on appeal, see id. at 1358; "land use planning is a sensitive area of social policy," Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996), that implicates "substantial" state interests, Mission Oaks, 989 F.2d at 361; and California state courts afford appellant "an adequate opportunity" to raise federal takings claims. Id.

Although the district court dismissed appellant's complaint without prejudice to the state court action, its dismissal on jurisdictional grounds will preclude appellants from returning to federal court. Because Younger abstention requires dismissal without prejudice, Beltran v. California, 871 F.2d 777, 782-83 (9th Cir. 1989), the district court's opinion is **VACATED**, and the case is **REMANDED** with instructions to dismiss on Younger ground. Each side shall bear its own costs.

APPENDIX C

Filed 01-10-96

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLD VAIL PARTNERS, Plaintiff, v. COUNTY OF RIVERSIDE, et al. Defendants.	)	No. CV 94-6309 CBM ORDER RE: MOTION FOR RECONSIDERATION

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Old Vail Partners, a California general partnership, purchased property (the "Property") within the boundaries of defendant Riverside County (the "County"). Prior to Old Vail's purchase of the property, the County had created Assessment District 159 ("AD 159") in which the property lies. Old Vail alleges that the County assessed the

property based on contemplated commercial zoning, i.e. on the assumption that the Property would ultimately be put to commercial use.

Ten days after Old Vail purchased the Property, the City of Temecula (the "City") annexed certain property within AD 159, including the property purchased by Old Vail. Four years later, the City adopted a general plan providing that the Property would be in an area designated for "professional office" use.

Old Vail then filed two lawsuits against the City and the County. One was filed in Riverside County Superior Court, Case No. 253-598, and the other, now pending here, was filed in the Southern District of California. Both suits were virtually identical and sought damages

for inverse condemnation[1] and conspiracy to violate plaintiff's federal civil rights, declaratory relief that the general plan was unjust and invalid, and an injunction prohibiting the City and County from collecting the assessment while enforcing the zoning restrictions and requiring that the City reform its general plan.[2]

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[1] Old Vail seeks damages against the County only, not against the City, for inverse condemnation.

[2] Old Vail's state court action against the County of Riverside for inverse condemnation was dismissed, with prejudice, on August 25, 1995. Old Vail's state court action against the County of Riverside, the City of Temecula and Albert Webb Associates was dismissed,

The County, joined by the City, filed a motion to dismiss. This Court granted those motions, concluding that the Tax Injunction Act bars this Court's jurisdiction of plaintiff's action. The Court also found that Plaintiff's claims under Section 1983 and for inverse condemnation did not resurrect the Court's jurisdiction because 1.) the Act bars those claims as well and 2.) plaintiff failed to state a claim in those causes of action upon which relief could have been granted.

Old Vail moved for reconsideration of the court's order on November 18, 1994. Recently, it was brought to this Court's attention that no order has issued with respect to said motion for

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with prejudice, on November 6, 1995.

reconsideration.[3] This present Order takes into consideration the parties' most recent arguments and evidence with regard to Old Vail's November 18, 1994 motion.

II. OLD VAIL FAILS TO MEET THE STANDARDS FOR RECONSIDERATION

Under Local Rule 7.16, a party may move for reconsideration of a decision "only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of

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[3] Defendant County of Riverside filed an additional motion on November 13, 1995, requesting this Court to issue a ruling on Old Vail's November 18, 1994 Motion for Reconsideration. Plaintiff filed an opposition to this recent motion on November 27, 1995.

reasonable diligence could not have been known . . . at the time of such decision, or (b) the emergence of such new material facts or a change of law occurring after the time of such decision or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." The moving party may not merely repeat or reargue its unsuccessful motion or opposition.

In this motion, Old Vail does exactly what is prohibited: it reargues its prior motion and relies upon evidence available to it prior to the Court's decision. Accordingly, Old Vail has neither met the standards necessary to succeed on a motion for reconsideration nor persuasively argued that the Court's decision was incorrect.

A. Old Vail's Attempt to Re-Characterize Its Complaint Does Not Save This Court's Jurisdiction

Old Vail claims that its complaint does not contest state authority to assess property or to tax but simply challenges the dual effects of the County and the City's actions. According to Old Vail, if its action is successful, there would be no more than a tangential effect on the state's revenue-gathering function. Old Vail also claims that its complaint is really a request for a refund for a de-facto downzoning. Based upon these characterizations of its actions, Old Vail argues that the Tax Injunction Act does not deprive this Court of jurisdiction.

Contrary to Old Vail's apparent belief, the Court considered these two

constructions of Plaintiff's complaint when making the decision set forth in its Order. Neither these constructions nor any of the out-of-state district court cases cited by Old Vail in support of its motion provide sufficient grounds for reconsideration.

B. Furey v. City of Sacramento Does Not Save This Court's Jurisdiction

Old Vail also argues that Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986), is controlling. In support of this argument, Old Vail merely reargues the points it raised in opposition to Defendants' motions to dismiss. Those points do not demonstrate any facts which the Court failed to consider. Moreover, those arguments were unpersuasive before and remain unpersuasive now for the reasons set

forth in the Court's Order.

C. Defendants Met The Standards For Dismissal Under Rule 12(b)(6)

Old Vail argues that dismissal under Rule 12(b)(6) was improper in this case because such motions are disfavored, rarely granted and proper only in "extraordinary cases." In deciding a motion to dismiss, the Court is required to accept the factual allegations of the complaint as true but is not required to accept as true merely conclusory allegations. Contrary to Old Vail's understanding of the law, dismissal is proper when, given the allegations in the complaint, the plaintiff will be unable to prove any set of facts upon which it could prevail. For the reasons set forth in the Court's Order of Dismissal, such is the case here.

D. The Dismissal of Plaintiff's State Court Action Does Not Save Its Claim For Inverse Condemnation and Deprivation of Civil Rights

Plaintiff's causes of action for inverse condemnation and for conspiracy for deprivation of civil rights under Section 1983 are both based upon an alleged taking in violation of the Fifth Amendment to the U.S. Constitution.[4] To constitute a violation of the Fifth

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[4] Plaintiff also bases its inverse condemnation claim on the Fifth Amendment to the California Constitution. The analysis under both is the same. Moreover, that claim does not provide a basis for federal jurisdiction so independent discussion of that issue is not necessary.

Amendment, the taking must be without just compensation. Therefore, plaintiff cannot bring either an action for inverse condemnation or a civil rights action for violation of the Fifth Amendment's takings clause without first unsuccessfully attempting to obtain just compensation through the procedures provided by the State. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. 3108 (1985).

In its November 27, 1995 opposition papers, Plaintiff announces the fact that its state court action has been dismissed, with prejudice. Without deciding whether or not this new fact constitutes a sufficient attempt to obtain just compensation through state procedures, the Tax Injunction Act bars

this Court's jurisdiction over this matter. Thus, Plaintiff's inverse condemnation and deprivation of civil rights claims are properly dismissed.

E. Old Vail's Recycled Arguments Are Improper

Old Vail also attempts to reargue the law on the requisite elements for a takings claim. Those arguments were appropriate for inclusion in its opposition to Defendants' motion. Under Local Rule 7.16, however, such reargument may not be included in a motion for reconsideration.

III. CONCLUSION

The Court DENIES Old Vail's Motion for Reconsideration.

IT IS SO ORDERED.

Dated: 1/10/96

Consuelo B. Marshall
United States
District Judge

APPENDIX D

Filed 11-08-94
Entered 11-09-94

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLD VAIL PARTNERS, Plaintiff, v. COUNTY OF RIVERSIDE, et al. Defendants.	)	No. CV 94-6309 CBM ORDER OF DISMISSAL

This matter is before the Court on defendants' motions to dismiss. The Court, the Honorable Consuelo B. Marshall presiding, reviewed the papers filed by counsel and set the matter for argument on October 31, 1994. Counsel for both parties appeared and submitted the matter to the Court on the papers filed. The Court ruled from the bench and now issues the following substantive Order granting defendants' motion to dismiss.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Old Vail Partners, a California general partnership, purchased property (the "Property") within the boundaries of defendant Riverside County (the "County"). Prior to Old Vail's purchase of the property, the County had created Assessment District 159 ("AD 159") in which the property lies. Old Vail alleges that the County assessed the property based on contemplated commercial zoning, i.e. on the assumption that the Property would ultimately be put to commercial use.

Ten days after Old Vail purchased the Property, the City of Temecula (the "City") annexed certain property within AD 159, including the property purchased by Old Vail. Four years later, the City adopted a general plan providing that the

Property would be in an area designated for "professional office" use.

Old Vail then filed two lawsuits against the City and the County. One was filed in Riverside County Superior Court, Case No. 253-598, and the other, now pending here, was filed in the Southern District of California. Both suits were virtually identical and sought damages for inverse condemnation[1] and conspiracy to violate plaintiff's federal civil rights, declaratory relief that the general plan was unjust and invalid, and an injunction prohibiting the City and County from collecting the assessment while enforcing the zoning restrictions

[1] Old Vail seeks damages against the County only, not against the City, for inverse condemnation.

and requiring that the City reform its general plan.[2]

The County, joined by the City, filed this motion to dismiss. First, defendants move under Federal Rule of Civil Procedure 12(b)(1) contending that the Court's jurisdiction is barred by the Tax Injunction Act. Second, defendants contend that plaintiff fails to state a claim under Rule 12(b)(6) because both its inverse condemnation claim and its civil rights claims lack any allegations

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[2] Old Vail's state court action against the County of Riverside for inverse condemnation was dismissed, with prejudice, on August 25, 1995. Old Vail's state court action against the County of Riverside, the City of Temecula and Albert Webb Associates was dismissed, with prejudice, on November 6, 1995.

that Old Vail attempted to receive just compensation.

II. THE TAX INJUNCTION ACT OF 1937 BARS THIS COURT'S JURISDICTION

Each of plaintiff's causes of action in this case seeks relief in one form or another from the conjunctive imposition of the County's assessment and the City's zoning. As such, plaintiff's complaint is best characterized as an attempt to interfere with the local government's fiscal affairs.

Under the Tax Injunction Act of 1937 (the "Act"),

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in

the courts of such state.

28 U.S.C. §1341. Congress enacted the Act because of the "imperative need of a State to administer its own fiscal operations." Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). The Act bars the federal court's jurisdiction of suits which would interfere with those fiscal operations so long as an adequate procedure exists in State court for those wishing to challenge the fiscal agenda. Rosewell v. LaSalle National Bank, 450 U.S. 503, 512, reh'g denied, 451 U.S. 1011 (1981). The Act applies to local taxes as well as State taxes, 17 Wright, Miller & Cooper, Federal Practice & Procedure, §4237, at 643-44 (2 ed. 1988), and should be construed broadly. Dillon v. State of Montana, 634 F.2d 463, 464-65 (9th Cir. 1980).

Plaintiff's complaint falls squarely within the ambit of the Act. Through its complaint, Plaintiff seeks to interfere with the local government's fiscal affairs. Although not labelled as such under California law, the assessment plaintiff seeks to eradicate is a tax defined under the Act. See Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 374 (3rd Cir. 1978) (tax under the Act determined by federal law, not state labels, in accordance with the policies of the Act); see, e.g., Alnoa G. Corp. v. City of Houston, 563 F.2d 769 (5th Cir.), cert. denied, 435 U.S. 970 (1978) (under the Act, street improvement assessments constitute "tax"). As evidenced by plaintiff's action in Riverside County Superior Court, the State courts provide

plaintiff with an adequate remedy which plaintiff has already chosen to pursue. Accordingly, plaintiff's claim for injunctive relief is barred by the Tax Injunction Act of 1937.

III. PLAINTIFF'S OTHER CAUSES OF ACTION ARE ALSO BARRED BY THE TAX INJUNCTION ACT

Plaintiff does not deny the applicability of the Act to its claim for injunctive relief but rather argues that jurisdiction is proper based upon its claim under Sections 1983 and 1985 and the principles of pendent jurisdiction. Each of the plaintiff's causes of action, however, including its claim under Sections 1983 and 1985, arises from the same conduct and involves an attempt to "enjoin, suspend or restrain the assessment, levy or collection of" a tax.

Dillon, 634 F.2d at 454-65 (Section 1983 claim seeking refund of state taxes barred by the Act). Accordingly, the broad jurisdictional bar of the Tax Injunction Act bars this Court's jurisdiction of plaintiff's action even though some of its causes of action seek damages for imposition of the assessment rather than simply an injunction. Id.

Plaintiff argues that Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986), implicitly refutes defendants' argument concerning the broad applicability of the Act to all of its claims. In Furey, the owner of agriculturally zoned land brought an inverse condemnation claim to recover the cost of sewer improvements for which he had previously been assessed but which were rendered useless when his land was

re-zoned as open space. In that case, the Court made no mention of any bar to its jurisdiction under the Tax Injunction Act. Plaintiff argues that the absence of any discussion of the Act implies that the Act's jurisdictional bar is clearly inapplicable. Plaintiff fails to mention, however, that the Furey court had explicitly noted that the plaintiff had exhausted his state procedures and therefore had no adequate state remedy remaining. Id. at 1450, n.1. Moreover, Furey did not involve a tax imposed by the government but rather an assessment requested by the property owners, including the plaintiff, in order to pay for improvements to their property. Id. at 1454. No one appeared to argue that the assessment was a tax. Because the assessment was imposed at the request of

the landowners themselves, the court held that it did not constitute a taking. Id. at 1454-57. Because of these factual distinctions, Furey does not undermine the Act's jurisdictional bar in this situation and plaintiff's argument fails.

IV. PLAINTIFF'S INVERSE CONDEMNATION CLAIM AND SECTION 1983 CLAIM FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Even if the Act did not bar this Court's jurisdiction of plaintiff's Section 1983 claim, plaintiff's complaint fails to state a claim under that Section upon which relief may be granted. In opposition to defendants' motion on this ground, plaintiff provides a cursory review of the standards for dismissal under Rule 12(b)(6), but does not address the specific points argued by the

defendants concerning the sufficiency of plaintiff's allegations. A review of plaintiff's allegations and the applicable case law indicates that plaintiff's allegations are insufficient.

A. Plaintiff Has Not Adequately Alleged A Taking Without Just Compensation In Violation of the Fifth Amendment

Plaintiff's causes of action for inverse condemnation and for conspiracy for deprivation of civil rights under Section 1983 are both based upon an alleged taking in violation of the Fifth Amendment to the U.S. Constitution.[3] To

[3] Plaintiff also bases its inverse condemnation claim on the Fifth Amendment to the California Constitution. The analysis under both is the same. Moreover, that claim does not provide a basis for federal jurisdiction so

constitute a violation of the Fifth Amendment, the taking must be without just compensation. Therefore, plaintiff cannot bring either an action for inverse condemnation or a civil rights action for violation of the Fifth Amendment's takings clause without first unsuccessfully attempting to obtain just compensation through the procedures provided by the State for obtaining such compensation. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. 3108 (1985).

In its complaint, plaintiff alleges that in compliance with California Government Code §§910 and 945.4, it filed and served on the defendants complaints

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independent discussion of that issue is not necessary.

alleging virtually the same facts as those set forth in this action and seeking that they either amend the City's general plan or recalculate the County's assessments.[4] Plaintiff also alleges that it served upon the County a written request to assess the Property. Plaintiff alleges that it has not received responses to either its complaints or its written request but admits that the deadline for response has not yet passed. Since plaintiff has not alleged (and, by its own admission, cannot allege) that it has attempted to obtain just compensation, its inverse condemnation claim and its Section 1983

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[4] It appears that these complaints are not the same as that filed by plaintiff against the defendants in Riverside Superior Court.

claim based upon a Fifth Amendment violation is dismissed.

V. CONCLUSION

The Tax Injunction Act bars this Court's jurisdiction of all of the causes of action in plaintiff's complaint. Plaintiff's claims under Section 1983 and for inverse condemnation do not resurrect the Court's jurisdiction because the Act bars those claims as well and because plaintiff fails to state a claim in those causes of action upon which relief can be granted. Therefore, this action is dismissed without prejudice to plaintiff's filing it in state court but is not given leave to amend to attempt to provide this Court with jurisdiction.

Dated: 11/7/94

CONSUELO B. MARSHALL
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 97-135

In The Supreme Court Of The United States

OCTOBER TERM 1996

OLD VAIL PARTNERS,

Petitioner,

v.

COUNTY OF RIVERSIDE; CITY OF TEMECULA,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENT, CITY OF TEMECULA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in ordering abstention under ***Younger v. Harris***, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) where Petitioner prosecutes an identical inverse condemnation action in state court.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Temecula, California ("City" or "Temecula"), hereby opposes Petitioner Old Vail Partners' ("Old Vail") petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on March 10, 1997. The Court of Appeals correctly decided that the District Court should abstain from hearing Old Vail's federal action under the *Younger* abstention doctrine inasmuch as Petitioner presently maintains an identical action in state court. While important to Petitioner, this case does not raise special or important issues of federal statutory or constitutional law warranting review by this Court. For these reasons and those set forth below, Old Vail's petition should be summarily denied.

STATEMENT OF THE CASE

Through identical state and federal actions below, Petitioner challenges the propriety of a local special tax and the City of Temecula's zoning authority, and contends that the application of that tax and zoning inversely condemns its property. Petitioner, therefore, seeks money damages from the City of Temecula, pursuant to 42 U.S.C. §§ 1983 & 1985, for violation of rights guaranteed under the Fifth Amendment and Article 1, section 19 of the California Constitution.[1]

---

[1] In that regard, the Fifth Amendment to the United States Constitution provides:

> ". . . nor shall private property be taken for public use, without just compensation."

The parallel provision of the California Constitution (Art. 1, sec. 19) provides:

> "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner."

Petitioner owns 39.8 acres of unimproved property in the City of Temecula ("the Property"). A year before Petitioner purchased the land, the County of Riverside ("County"), acting pursuant to the Municipal Improvement Act of 1913, as codified, California Streets & Highways Code §§ 10000, *et seq.*, formed Special Assessment District AD 159 to finance numerous public improvements within that special district.

The Property is located within AD 159, and consequently, the County levied an assessment on the Property for a proportionate share of the costs of the public improvements. The County thereafter recorded a lien against the Property to secure payment of the assessment in accordance with California law.

Old Vail purchased the Property on November 21, 1989. At the time, the land was located in an unincorporated section of the County. The local voters, however, had previously approved incorporating the City of Temecula

within the County, and on December 1, 1989, Petitioner's land became part of the newly-incorporated City of Temecula.

As County land, the Property was zoned for "commercial" use. The City maintained the County's land use designations for a period of four years. On November 9, 1993, the City adopted its General Plan which designated the real property adjoining California State Highway 79, one of the City's major thoroughfares, for "office professional" use. Petitioner's land adjoins that highway and thus became zoned for "office professional" use.

At the same time, the City Council adopted the Land Use Element of the General Plan, which identified the Property as part of "Future Specific Plan Areas Z_2 and Z_3" and within a "commercial specific plan overlay." This designation permits office professional uses as a matter of right, and further contemplates a wide range of other forms of commercial development, subject to Planning Commission

approval. Such an approach affords the City a measure of control over commercial development along its major thoroughfares.

Even though it ***never*** submitted a commercial development plan for approval, Petitioner alleges that the City "down-zoned" the Property, and thereby completely destroyed its economic viability. Without first exhausting available administrative remedies, Old Vail filed concurrent complaints in the Superior Court of the State of California for the County of Riverside and the United States District Court for the Central District of California. Through nearly identical pleadings, Petitioner alleges, *inter alia*, that Temecula has effected a "taking" in violation of the Constitutions of the United States and the State of California.

The gravamen of both lawsuits is that the assessments levied on the Property prior to the City's incorporation were based on its use for "commercial" purposes, and that the

City's subsequent alleged down-zoning to "other professional" office use renders *any* economically viable use of the property impossible.

The State Action -- Old Vail seeks to recover damages from the City under the theory of inverse condemnation (RCSC Case No. 253598). Old Vail predicates its claims on the state and federal constitutions.[2] On February 23, 1996, the court granted the City's motion for judgment on the pleadings. Old Vail appealed from the resulting judgment. That appeal is pending in the Court of Appeal for the State of California, Fourth Appellate District (4th Civ. No. E016793).

The Federal Action -- Old Vail filed an identical action in federal court. Upon the City's motion to dismiss,

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[2] Old Vail characterizes its federal claims as "aris[ing] under the Federal Civil Rights Act, *inter alia*, 42 U.S.C. §1983 and §1985, to redress the deprivation, under color of state law, or rights, privileges and immunities secured to plaintiffs by the Constitution of the United States." (State Court Complaint at 9).

brought pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), the District Court dismissed Old Vail's complaint on two grounds. First, it held that the Tax Injunction Act of 1937, as codified, 28 U.S.C. §1341, precluded federal jurisdiction over Old Vail's complaint because it challenged a locally imposed tax. Second, the District Court determined that the complaint was not ripe for federal judicial review because Old Vail could not make the requisite allegation that it had unsuccessfully attempted to obtain just compensation.[3] The order of dismissal was entered on November 9, 1994.

Petitioner timely moved for reconsideration of the order granting the City's motion. The District Court denied that motion on the basis that Petitioner failed to present any new grounds warranting reconsideration of the prior order,

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[3] *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

which had been the subject of thorough briefing and argument by the parties. The order denying reconsideration was entered on January 10, 1996.

Petitioner thereafter appealed to the Court of Appeals on February 10, 1997. Following briefing and argument, the Court of Appeals issued a decision vacating the judgment and remanding the case to the District Court with an order to abstain from exercising federal jurisdiction under ***Younger v. Harris***, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) ("***Younger***").

On February 21, 1997, Old Vail petitioned for rehearing. In its petition, Old Vail requested that the order of abstention be made under ***Railroad Commission of Texas v. Pullman Co.***, 312 U.S. 496, 61 S.Ct. 642, 85 L.Ed.2d 971 (1941) ("***Pullman***") rather than ***Younger***.[4] On March 10,

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[4] As the Court of Appeals explained in ***Kollsman v. City of Los Angeles***, 737 F.2d 830, 833 (9th Cir. 1984): "***Pullman*** allows postponement of the exercise of federal jurisdiction

1997, the Ninth Circuit denied Old Vail's petition for rehearing. On remand, the District Court dismissed Old Vail's complaint without prejudice on July 3, 1997.

Old Vail filed the instant petition for writ of certiorari on July 22, 1997. As set forth below, the issues presented in this case do not warrant review by the United States Supreme Court through a writ of certiorari, and the petition should be summarily denied.

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when 'a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law.' ***C-Y Development Co. v. City of Redlands***, 703 F.2d 375, 377 (9th Cir. 1983) (quoting ***County of Allegheny v. Frank Mashuda Co.***, 360 U.S. 185, 189, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959))."

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

I.

THE COURT OF APPEALS DID NOT ERR IN ORDERING ABSTENTION UNDER *YOUNGER*

Seeking to pique the Court's interest, Petitioner dramatically insists that abstaining under ***Younger*** inequitably precludes an inverse condemnation litigant from ever adjudicating takings claims in federal court (*Pet.* at 8), and that this petition presents the Court with the opportunity to review when and whether the federal courts should apply the ***Younger*** and ***Pullman*** abstention doctrines. In so doing, Petitioner, however, nowhere contends that it cannot obtain a fair hearing in the California state courts, or that California's courts are somehow not able to adjudicate Petitioner's garden-variety inverse condemnation claims, or that it has been denied the opportunity to litigate its federal claims fully and completely in

the forum of its own choosing.

Old Vail does not challenge the propriety of federal abstention. Instead, it is unhappy with the Court of Appeals' decision to order abstention under ***Younger***, rather than ***Pullman***. Old Vail therefore seeks a writ of certiorari to preserve its opportunity to relitigate its takings claim in federal court should the City prevail in the state court proceedings *initiated by Petitioner*.

The petition should be denied for one simple reason: The Court of Appeals decided correctly to abstain under ***Younger***, given the facts and circumstances presented in this case. The Court of Appeals accurately perceived and applied the strong policy of avoiding federal interference in pending state proceedings enforcing state public policy, absent extraordinary circumstances (not presented herein), to Old Vail's claim that Temecula's change in zoning of property located within a special assessment district, created under

California law, constitutes a taking without just compensation. *See Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359, 360 (9th Cir. 1993), cert. denied*, 510 U.S. 1110 (1994), *quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The Court of Appeals also correctly applied decisions conclusively holding that federal claims are appropriately adjudicated in state proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (state courts presumed adequate forums to raise federal claims "in the absence of unambiguous authority to the contrary"); *Mission Oaks*, 989 F.2d at 361 (finding California state courts "provide ... an adequate opportunity to raise federal questions."). Moreover, Petitioner's claims do not involve unsettled questions of state law warranting *Pullman* abstention.

Younger and its progeny implement traditional concepts of equity **requiring** federal courts to refrain from acting where there exists an adequate remedy at law and where the petitioning party is not threatened with irreparable injury (***Younger***, 401 U.S. at 43-44). The ***Younger*** doctrine further serves to prevent a multiplicity of suits where a single action will adequately protect the rights asserted. Most importantly, by acknowledging the fundamental competency of state courts to adjudicate federal issues, the ***Younger*** doctrine furthers vital interests of comity which is at the heart of "Our Federalism."[5]

As the Court of Appeals correctly directed the District Court to abstain under ***Younger***, the Court should summarily deny Old Vail's petition for writ of certiorari.

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[5] ***Younger***, as well as the other doctrines of abstention, is an exception to the general rule that federal courts should exercise the jurisdiction conferred on them by statute. ***See Colorado River Water Conservation Dist. v. United States***, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

II.

OLD VAIL'S CLAIMS ARE WITHOUT MERIT AND SHOULD BE SUMMARILY DENIED

A. Petitioner Mistakenly Assumes That It Is Guaranteed a Federal Forum as a Matter of Constitutional Right

Old Vail seeks to recover damages from the City of Temecula on a theory of inverse condemnation. That theory of liability, of course, exists under both California and federal law. *See Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016, 282 Cal.Rptr. 877 (1991); *cert. denied*, 505 U.S. 1219 (1992); *MacDonald, Sommer & Grates v. County of Yolo*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Even though it predicates its claims, in part, on the federal Constitution, Old Vail is not guaranteed a federal forum as a matter of constitutional right. The settled rule is that Congress is not obliged to provide that a federal claim be

litigated in a federal district court. ***See Palmore v. United States***, 411 U.S. 389, 400-401, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); ***Lockerty v. Phillips***, 319 U.S. 182, 187-89, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943). Acting under its constitutional authority to legislate the scope of district court jurisdiction (United States Const., Art. III, §1), Congress may and often does remit federal claims to the state courts. ***See, e.g., Franchise Tax Bd. v. Construction Laborers Vacation Trust***, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); 28 U.S.C. §1341; 28 U.S.C. §1342.

Old Vail fails to offer *any* authority, case law or statutory, to support its underlying contention that it is entitled to adjudicate its federal claims in a federal court. The reason for its failure is manifest: there is no such right in cases such as the one at bar. California courts regularly, and quite competently, adjudicate issues of federal law, and the policy of comity militates in favor of acknowledging California's ability

to determine whether Old Vail's property was inversely condemned by the City of Temecula's zoning decision.[6]

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[6] California courts regularly adjudicate federal constitutional claims. *See, e.g., **Hensler v. City of Glendale***, 8 Cal.4th 1, 32 Cal.Rptr.2d 244 (1994); ***Varjabedian v. City of Madera***, 20 Cal.3d 285, 142 Cal.Rptr. 429 (1977); ***HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 125 Cal.Rptr. 365 (1975), cert. denied***, 425 U.S. 904 (1976). In ***Gilbert v. State of California***, 218 Cal.App.3d 234, 253, 266 Cal.Rptr. 891 (1990) the California Court of Appeal explained:

> "California cases frequently do not identify whether the inverse condemnation action is brought under state or federal law, or both, and in any event **often discuss federal precedent in deciding state inverse condemnation claims**. The recent litigation in ***First Lutheran Church v. Los Angeles County***, *supra*, 482 U.S. 304, represents the most startling, wholesale adoption of federal precedent to resolve a state constitutional claim. The lawsuit began solely as a state cause of action. The United States Supreme Court, however, was able to devise a federal question from the church's arguments before the state Court of Appeal. The church asserted recent federal decisions demonstrated federal constitutional error in the California Supreme Court's decision in ***Agins I***. Since the Court of Appeal applied ***Agins I*** to dismiss the church's action, thus rejecting the federal claim, the high court concluded the church preserved a federal question on appeal. On remand to determine whether the county's action amounted to an unconstitutional taking, the Court of Appeal for all practical purposes

B. California Courts Present an Appropriate Forum in Which to Adjudicate Petitioner's Federal Takings Claim

Old Vail contends that abstaining under *Younger* forecloses its opportunity to litigate its federal claims in a federal forum (*Pet.* at 10, 27-29). Such a concern is necessarily predicated on Old Vail's apparent anxiety that the California state courts will not adequately adjudicate its federal claims, or be in a position to deal with the "synergistic effects" (*Pet.* at 23) of zoning ordinances affecting specially assessed property.

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analyzed the taking claim entirely on the basis of federal decisional law applying and construing the Fifth Amendment. (***First English Evangelical Lutheran Church v. County of Los Angeles*** (1989) 210 Cal.App.3d 1353 [258 Cal.Rptr. 893]; see also ***Ellison v. County of Ventura*** (1990) 217 Cal.App.3d 455 [265 Cal.Rptr. 795] [using *Agins II* to resolve state inverse condemnation claim]."

However, Old Vail nowhere contends that it has been (or will be) denied the opportunity to litigate its federal claims in California state court. Instead, Petitioner, through a mere *ipse dixit*, seeks a free insurance policy against defeat in the state courts in the form of ***Pullman*** stay. While such an outcome would expand Old Vail's tactical options and please its attorneys, the Constitution does not guarantee Old Vail access to a federal forum in the event of a disagreeable outcome in the state forum on the very same claims. The ***Younger*** doctrine appropriately serves, among other values, to prevent such multiplicity of suits where a single action will adequately protect the rights asserted.[7]

The federal courts have conclusively determined that federal claims may be adequately adjudicated in the state

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[7] In fact, Old Vail need only have the opportunity to assert its federal claims in state court to satisfy ***Younger***'s concerns. Whether or not it avails itself of that opportunity is irrelevant. ***See, e.g., Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.***, 477 U.S. 619, 106 S.Ct. 2718, 2724, 91 L.Ed.2d 512 (1986).

proceedings. *See Pennzoil*, 481 U.S. at 15-17. In *Mission Oaks*, 989 F.2d 359, for example, plaintiff filed suit in state court to challenge the constitutionality of a rent control ordinance. When the plaintiff filed in federal district court a year later, the court dismissed the action on the basis of *Younger*. The Court of Appeals affirmed the dismissal, concluding that *Younger* applies to claims challenging rent control ordinances as regulatory takings. In so doing, the Court of Appeals explained:

> "[W]e refuse to find that the courts of California are inadequate forums in which to raise federal takings claims.... We are convinced, as was the district court, that the **state courts will provide Mission Oaks an adequate opportunity to raise federal questions.**"

Mission Oaks, 989 F.2d at 361 (emphasis added).

Simply put, the availability of a federal forum is not indispensable to the adjudication of federal claims. *See Fresh*

Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1362 (9th Cir. 1986) ("All that ***Middlesex*** requires is an opportunity to present the federal issue...."). As this Court stated in ***Juidice v. Vail***, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977):

> "Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke ***Younger*** abstention .... **Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate**. Presumptively, therefore, the principles which underlie ***Younger*** call for dismissal of the action."

Juidice, 430 U.S. at 337 (emphasis added).

Old Vail attempts to avoid this body of law by arguing that it has a right to separate state and federal forums on the basis that it is pursuing the adjudication of "distinct constitutional rights." (*Pet.* at 9). That argument, however, lacks a crucial explanation as to how the federal claims presented by Old Vail in the state forum are distinct from its identical federal claims presented to the District Court. Again, the reason is simple: Old Vail is simply advancing the same claims in two courts. ***Younger*** is appropriately applied in such a situation.

C. The Court of Appeals Fully Considered and Correctly Decided That Petitioner's Federal Action Should Be Dismissed on *Younger* Grounds

This Court has set out a three-pronged test for determining the circumstances in which abstention under ***Younger*** is appropriate and must be applied. Those circumstances must include the following:

"(1) the state proceedings are ongoing;

(2) the proceedings implicate important state interests; and

(3) the state proceedings provide an adequate opportunity to raise federal questions."

Middlesex County Ethics Committee, 457 U.S. at 432; ***Fresh Int'l***, 805 F.2d at 1357-58; ***Beltran v. California***, 871 F.2d 777, 781 (9th Cir. 1988).

In deciding to apply ***Younger***, the United States Court of Appeals for the Ninth Circuit made the requisite findings: "[i]n addition to this federal action, appellant is pursuing **identical** claims against defendants in California state court." (*Pet.*, Appendix B, at 2) (emphasis added). Applying the ***Middlesex*** test to the Old Vail's concurrent and identical federal and state actions, the Court of Appeals found:

> "Each of these criteria is met: [1] Appellant's parallel state action was filed on the same day as the federal complaint and is currently on appeal [citations omitted]; [2] 'land use planning is a sensitive area of social policy,' [citations omitted] that implicates 'substantial' state interests; and [3] California state courts afford appellant 'an adequate opportunity' to raise federal takings claims."

(*Pet.*, Appendix B, at 3). Consequently, the Court of Appeals vacated the District Court's opinion and remanded the case to be dismissed without prejudice on the grounds of ***Younger*** abstention.

In short, the Court of Appeals correctly found that each criterion was satisfied. It properly abstained from the Petitioner's case on ***Younger*** grounds as it was **required** to do. Although Petitioner attempts to make a case for applying ***Pullman***, Old Vail nowhere denies the criteria for abstaining under ***Younger*** were not met in this instance. Instead, Old

Vail argues on the basis of an undesirable outcome rather than in how the Court of Appeals implemented the unambiguous guidelines of ***Middlesex***, and attempts to argue that the competing doctrines have been applied inconsistently and interchangeably in the land use context.

Its points notwithstanding, Old Vail cannot ignore (though it tries) the fact that important state interests (as to community zoning and the means of financing public improvements) are implicated by its claims, that state proceedings were ongoing at the time of federal action, and that the state court provides an adequate opportunity and competent forum to present the federal claims. No matter how one looks at it, this case presents a textbook example of ***Younger*** abstention.[8]

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[8] Old Vail, additionally, attempts to attribute significance to the respective moments of filing its state and federal complaints (*Pet.* at 16, fn. 3). When the respective clerks accepted the identical complaints for filing is of no moment. "Whether the state proceedings are 'pending' is not determined by comparing the commencement dates of the federal and state

III.

ABSTAINING UNDER *YOUNGER* DOES NOT CONFLICT WITH PRECEDENT OF THE NINTH CIRCUIT

Petitioner boldly asserts that the Court of Appeals' decision to abstain under ***Younger*** doctrine conflicts with its own precedent and should be set aside for that reason (*Pet.* at 11, 18). In support of that inaccurate assertion, Old Vail points to several decisions applying ***Pullman*** to land use/inverse condemnation cases. Petitioner's discussion focuses only on two readily distinguishable cases. The first case, upon which Petitioner place principal reliance, is the decision of the District Court in ***Furey v. City of Sacramento***, 592 F.Supp. 463 (N.D.Cal. 1984). Other than stating that

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proceedings." ***Polykoff v. Collins***, 816 F.2d 1326, 1332 (9th Cir. 1987). ***Younger*** abstention applies if the state proceedings have been initiated "before any proceedings of substance on the merits have taken place in federal court." ***Hawaii Housing Auth. v. Midkiff***, 467 U.S. 229, 238, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

federal and state actions had been filed, the court in ***Furey*** does not discuss the analysis involved (or not) in applying ***Pullman*** abstention. Rather, the district court simply stated that ***Pullman*** abstention was applied in the prior action and nothing more.[9]

Petitioner next invokes the recent decision in ***Sinclair Oil Corp. v. County of Santa Barbara***, 96 F.3d 401 (9th Cir. 1996). ***Sinclair*** is even more distinguishable given that the parties had informed the court that the state litigation had been voluntarily stayed (96 F.3d at 404 n.1). As such, the state

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[9] Petitioner similarly directed the District Court's attention to the ***Furey*** decision. In its opinion (*Pet.*, Appendix D, at 10), the District Court noted:

> "Plaintiff fails to mention, however, that the *Furey* court had explicitly noted that the plaintiff had exhausted his state procedures and therefore had no adequate state remedy remaining. *Id.* At 1450, n.1."

The District Court correctly decided that the decision in ***Furey*** did not apply to Old Vail's claims. Nothing about the claim has changed since the District Court entered its order of dismissal on November 9, 1994.

proceedings in ***Sinclair*** were *not* ongoing so as to satisfy the first element of the ***Middlesex*** test in deciding whether to apply ***Younger*** abstention.

Moreover, as Old Vail readily admits, the fact that the state action did not request damages and/or "just compensation" prevented the state court from addressing this important federal issue. As such, ***Younger*** was inapplicable given that the state proceeding would not have provided an adequate opportunity to raise this federal issue. Not surprisingly, the court applied ***Pullman*** to abstain, albeit temporarily, from hearing the takings claim.

Petitioner then attempts to fashion additional requirements and/or restraints to applying the ***Younger*** abstention doctrine. Petitioner, for example, cites Sixth Circuit authority to prove that ***Younger*** is inapplicable where there is a single plaintiff in both the state and federal actions, and where the federal action is not an attempt to contravene or undermine the correlative state action (*Pet.* at 27). In so arguing, Old Vail

boldly asserts that "[t]he U.S. Supreme Court has never explicitly sanctioned the employment of ***Younger*** abstention" in such circumstances (*Pet.* at 25-26). The United States Supreme Court, of course, is not able, in advance, to identify every instance in which ***Younger*** abstention is appropriate. Arguing in the negative, however, only results in Petitioner's succeeding to prove nothing.

Although Old Vail is able to cite to a Sixth Circuit decision (***Crawley v. Hamilton County Commissioners***, 744 F.2d 28 (6th Cir. 1984)), and a Ninth Circuit decision case referencing ***Crawley*** in a footnote, those cases do not control, or even lend assistance, to the task at hand. A brief review of the previously discussed and *more recent* Ninth Circuit decision, ***Mission Oaks***, reveals that the ***Middlesex*** test controls the analysis (***Mission Oaks***, 989 F.2d at 360-63), and whether the plaintiff is identical in both actions (which was the case) or whether there was a supposed attempt to restrain the state action is irrelevant.

Therefore, the decision below to abstain under *Younger* was proper and required.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny Old Vail's petition for a writ of certiorari.

Dated: August 21, 1997

Respectfully submitted,

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No. 97-135

In The

Supreme Court of the United States

October Term, 1996

OLD VAIL PARTNERS,

Petitioner,

v.

CITY OF RIVERSIDE; CITY OF TEMEMCULA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), rather than *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941), to a California inverse condemnation litigant, filing concurrent state and federal actions, improperly forecloses, in violation of the Fifth Amendment to the U.S. Constitution, that litigant's access to the federal courts for the adjudication of a civil rights claim under 42 U.S.C. §§ 1983, 1985.

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INTRODUCTION

Petitioner, Old Vail Partners (hereinafter "Petitioner"), respectfully requests this Court to consider the following reply to the Opposition of Respondent, City of Temecula (hereinafter "Respondent"), in its determination to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") entered herein on March 10, 1997.

REASONS FOR REJECTING THE OPPOSITION

A. The Equal Protection Clause Prohibits Disparate Treatment Of Similarly Situated Litigants.

It is axiomatic to our system of jurisprudence that persons under similar circumstances be afforded equal protection of law. (See, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1985, 48 L.Ed.2d 495 (1976) [finding that "[t]he federal sovereign, like the States, must govern impartially"].) The Ninth Circuit's discordant application of abstention doctrines to similarly situated land-use litigants, however, affronts this apothem by exacting forfeitures from those litigants to whom ***Younger*** abstention is applied.

The antagonistically symbiotic relationship between California statutory authority and federal case law requires the filing of separate state and federal complaints as a condition precedent to preserving access to state and federal forums. (See, e.g., *Furey v. City of Sacramento*, 780 F.2d 1448 (9th Cir. 1986)); *Santa Fe Land*

Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996); compare, *Jones Intercable v. City of Chula*, 80 F.3d 320, 324 (9th Cir. 1996); California Government Code §§ 945.6, 65009.)

The Ninth Circuit has implicitly recognized the relationship between state statutory authority and federal case law precedence, via its consistent employment of ***Pullman***, rather than ***Younger*** abstention in land-use cases. (See, *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996); *Bank of America Nat. T&S. v. Summerland City Water Dist.*, 767 F.2d 544 (9th Cir. 1985); *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985); *Kollman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984); *Isthmus Landowners Ass'n v. State of California*, 601 F.2d 1087 (9th Cir. 1979); *Newport Investments v. City of Laguna Beach*, 564 F.2d 893 (9th Cir. 1977); *Rancho Palos Verdes Corporation v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976).)

The juristic and factual correlation between the above-cited cases and Petitioner necessitates a similar disposition in this action. Since the choice of abstention doctrine is critical to the continued viability of these litigants' federal civil rights claims, consistency of application in abstention is paramount. The anomalous application of "***Younger*** abstention to any of these litigants could result in a significant forfeiture. To this end, Old Vail respectfully entreats this Court's invocation of jurisdiction to adjudicate the propriety the Ninth Circuit's evocation of ***Younger*** abstention.

B. Article II, Subsection A Of Respondent's Opposition Is Irrelevant.

Respondent's generic dissertation regarding any litigant's right of access to a federal forum for the adjudication of federal claims is irrelevant and misguided. The instant issue involves the inquiry as to whether the application of ***Younger*** abstention, rather than ***Pullman*** abstention, to a California inverse condemnation litigant, filing concurrent state and federal actions, inappropriately forecloses, in violation to the Fifth Amendment to the U.S. Constitution, that litigant's access to the federal courts for the adjudication of a federal civil rights. Inextricably intertwined with this issue is the prior precedence of the Ninth Circuit adjudicating the California inverse condemnation litigant's right of access to federal forums.

Ninth Circuit precedence has long recognized the authority of federal courts to abstain under ***Pullman*** pending a land-use litigant's exhaustion of state procedures. (See, *Rancho Palos Verdes Corporation v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976).) The anomalous application of ***Younger*** to old Vail has injected an unsettling degree of uncertainty into the application of the judicially created abstention doctrines so that the employment of either ***Pullman*** or ***Younger*** abstention to a land-use litigant appears acceptable to the Ninth Circuit. It is this power of the Ninth Circuit to employ separate abstention doctrines, inclusive of distinct ramifications, to comparably situated litigants which creates the injury requiring intervention by this Court, **not** any generic right of access to a federal forum.

C. Article II, Subsection B Of Respondent's Opposition Is Irrelevant.

Respondent's statements concerning "Old Vail's apparent anxiety" constitute uncorroborated conjecture and attempts to obscure the purpose of this petition for certiorari. It is well settled that a state court judgment commands the same res judicata effects in federal court as it does in the rendering state court. (*St. John v. Wisconsin Employment Relations Bd.*, 340 U.S. 411, 71 S.Ct. 375, 95 L.Ed. 386 (1951); *State Corp. Comm'n v. Wichita Gas Co.*, 290 U.S. 561, 569, 54 S.Ct. 321, 78 L.Ed. 500 (1934).) Thus, to the extent the California courts adjudicate Old Vail's federal claims, the doctrine of res judicata will govern the disposition of the federal case.

This petition for certiorari simply seeks this Court's approbation of the axiom that persons under similar circumstances be afforded equal protection of law. To the extent, the Ninth Circuit is at liberty to govern similarly situated land-use litigants under separate abstention doctrines, inclusive of distinct procedural ramifications, the unfortunate land-use litigants, such as Petitioner, will be denied equal protection under the law.

D. Respondent Implicitly Concedes The Validity Of The Petition For Certiorari.

Respondent's analysis concerning the applicability of ***Younger*** validates the veracity of Petitioner's postulate by authenticating the ambiguity of the Ninth Circuit's approach to abstention in land-use litigation. Articulated in the alternative, Respondent must exercise a modicum

of consistency in its analysis of abstention doctrines. Respondent cannot rationally advocate the application of ***Younger*** to Petitioner, without affronting the prior precedent of the Ninth Circuit; unless it is assumed that an ambiguity among the doctrines authorizes the application of either doctrine. Such as ambivalent application of abstention doctrines by the Ninth Circuit is fundamentally inequitable and should evoke the jurisdiction of this Court to prevent the forfeiture of damages of approximately Ten Million Dollars by Petitioner.

E. Article II, Subsection C of Respondent's Opposition Concludes With An Erroneous Statement Of Law.

Despite the conspicuous absence of citation to any authority, Respondent brazenly asserts that:

> "Again, the reason is simple: Old Vail is simply advancing the same claims in two courts. **Younger** is appropriately applied in such a situation." (Opposition at 21.)

The above-quoted assertion is both erroneous and expressly refuted by the holding of *Crawley v. Hamilton County Commissioners*, 744 F.2d 28 (6th Cir. 1984) [holding ***Younger*** to be inapplicable where the federal plaintiffs are also the state plaintiffs and the federal action does not attempt to impair or impede the state action]; see also, *Fresh Int's Corp. v. Agricultural Labor Relations Board*, 805 F.2d at 1353, 1360, fn. 8 [acknowledging the validity of *Crawley*].

F. Respondent's Reliance Upon The Decision Of The District Court Is Misplaced And Misleading.

Respondent inappropriately attempts to bolster the legitimacy of its Opposition by reference to the order of the district court wherein it was stated:

> "Plaintiff fails to mention, however, that the Furey court had explicitly noted that plaintiff had exhausted his state procedures and therefore had not adequate state remedy remaining" (*Furey v. City of Sacramento*, 780 F.2d 1448 (9th Cir. 1986.) (Opposition at p.26, n.9.)

As an initial matter, the district court failed to recognize that the exhaustion of Furey's state procedures occurred as a direct result of the invocation of ***Pullman*** abstention, which authorized the retention of federal jurisdiction pending a final adjudication of Furey's California claims. Secondly, the Ninth Circuit implicitly recognized the specious nature of the above-quoted passage, via its order vacating the judgment of the district court.

G. Respondent Fails To Address The Relevance Of *Pullman* Abstention.

The entirety of Respondent's inadequate consideration of ***Pullman*** abstention is contained within the statement:

> "Petitioner's claims do not involve unsettled questions of state law warranting **Pullman** abstention." (Opposition at p.12.)

The unsubstantiated and cursory nature of Respondent's consideration of the ***Pullman*** abstention is

expressly refuted by the petition for certiorari. (Petition at 26.)

CONCLUSION

Old Vail respectfully requests the Court to grant this petition for certiorari.

Dated: September 2, 1997

Respectfully submitted,

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No. 97-135

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In The Supreme Court Of The United States

OCTOBER TERM 1996

OLD VAIL PARTNERS,

Petitioner,

v.

COUNTY OF RIVERSIDE; CITY OF TEMECULA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT COUNTY OF RIVERSIDE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals erred in ordering abstention under ***Younger v. Harris***, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), rather than under ***Railroad Comm'n of Texas v. Pullman***, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), where petitioner is litigating its federal claim in a pending state court proceeding, and the proceeding implicates important state interests.

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INTRODUCTION

The petition for writ of certiorari filed by Old Vail Partners ("Old Vail") misconstrues the abstention doctrines and how they apply to this case.

As set forth below, ***Younger*** abstention is proper where a pending state proceeding implicates important state interests, and the proceeding affords the litigant an adequate opportunity to raise the federal constitutional issue. Those factors are present here -- a point that Old Vail appears to concede. Accordingly, Old Vail has failed to show that the Ninth Circuit Court of Appeals erred in ordering ***Younger*** abstention.

Pullman abstention only arises where an unsettled question of state law may render adjudication of the constitutional issue unnecessary. For example, if a state statute arguably would be unconstitutional if interpreted one way, but constitutional if interpreted another way, ***Pullman*** abstention may be ordered until the statute is construed in a state proceeding. Here, Old Vail has not pointed to any unsettled issue of state law that would bring ***Pullman*** into play.

As a result, Old Vail's contention that the Ninth Circuit has muddled the abstention doctrines and is applying them disparately to similarly-situated litigants has no merit. The unpublished memorandum decision ordering ***Younger*** abstention simply means that Old Vail will continue to pursue its constitutional claim in state court -- a forum it voluntarily chose -- and will not be given a "second bite at the apple" in district court.

For these reasons, respondent County of Riverside (the "County") respectfully submits that Old Vail's petition should be denied.

STATEMENT OF THE CASE

Old Vail formerly owned a parcel of real property (the "Property") within the County. Before Old Vail bought the Property, the County created Assessment District No. 159 ("AD No. 159") under the Municipal Improvement Act of 1913, California Streets & Highways Code §§ 10000 *et seq.* (the "1913 Act"). The Property falls within the boundaries of AD No. 159.

The 1913 Act empowers local governmental entities in California to form assessment districts to finance public

improvements within the boundaries of such districts. A lien is placed on each property within the assessment district to secure payment for the improvements financed. Initially the lien may be paid in cash and fully satisfied, although as a practical matter few property owners choose to do so. Rather, bonds are issued to finance the amount needed to pay for the improvements. The lien amount against each property is collected over time through assessment installments. Proceeds from the assessment installments are used to pay debt service on the bonds.

Under the 1913 Act, before an assessment can be levied, the assessment engineer must calculate the direct and special benefit to each property within the assessment district. This enables the assessment engineer to divide the cost of the improvements financed in proper proportion among the various properties. Old Vail alleges that in AD No. 159 the County assessed the Property based on contemplated commercial zoning. In other words, Old Vail alleges that its proportionate share of the assessment was based on the Property ultimately being put to commercial use.

On December 1, 1989, respondent City of Temecula (the "City") annexed the land located within AD No. 159, including the Property. On November 9, 1993, the City

adopted its general plan, which shows the Property to be in an area of "professional office" designation. Old Vail alleges that by designating the Property as "professional office," the City down-zoned the Property from the "commercial" zoning that the County had contemplated. Old Vail alleges that this rendered its assessment lien excessive by some $600,000.

On August 3, 1994, Old Vail filed a complaint against the County and the City in the United States District Court, Central District of California. That same day Old Vail also filed a complaint in California state court. Both complaints alleged, among others, a takings claim under the Fifth Amendment of the United States Constitution and 42 U.S.C. §§ 1983 and 1985.

The County filed a motion to dismiss Old Vail's district court complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the district court lacked subject matter jurisdiction under the Tax Injunction Act of 1937, 28 U.S.C. § 1341, or alternatively that Old Vail had failed to state a claim upon which relief can be granted. The City joined in this motion. The district court issued a written decision granting the motion and dismissing the action without prejudice to Old Vail going forward in state court. The district court subsequently denied a

motion by Old Vail for reconsideration. Old Vail timely filed a notice of appeal.

Meanwhile, Old Vail continued to pursue its state court action, including the takings claim. After numerous hearings and extensive briefing addressed to the merits of Old Vail's takings claim and its state law theories of relief, the state court entered a final judgment dismissing the action on the grounds that Old Vail failed to allege facts sufficient to constitute a cause of action -- the California equivalent of dismissal under Fed. R. Civ. P. 12(b)(6). Old Vail filed a notice of appeal. The appeal has been fully briefed and is awaiting oral argument before the California Court of Appeal.

On February 3, 1997, Old Vail's appeal of the district court decision came on for oral argument before the Ninth Circuit Court of Appeals. On February 10, 1997, the Court of Appeals issued a memorandum decision vacating the district court's decision and remanding the case for dismissal under ***Younger***. Thereafter Old Vail filed the pending petition for writ of certiorari.

REASONS WHY A WRIT SHOULD BE DENIED

I. The Court Of Appeals Correctly Ordered Younger Abstention Because The Case Implicates Important State Interests And Old Vail Has An Adequate Opportunity To Litigate Its Constitutional Claim In State Court.

The Court has said that there are two primary types of abstention: ***Pullman*** abstention and ***Younger*** abstention. Where the former involves unsettled issues of state law, the latter involves

> considerations of comity and federalism, both as they relate to the State's interest in pursuing an ongoing state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477, 97 S. Ct. 1898, 1902-03, 52 L. Ed. 2d 513 (1977).

In ***Younger***, one of the plaintiffs was being prosecuted under a California statute, and he filed suit in district court to have that statute declared unconstitutional. 401 U.S. at 38-39, 91 S. Ct. 747-48. The Court held that relief was barred because of a policy against federal intervention in state criminal proceedings. In discussing this

policy the Court used the term "Our Federalism," and spoke of comity and a reluctance to interfere with legitimate state activities. 401 U.S. at 43-45, 91 S. Ct. at 750-51.

In subsequent decisions the Court extended the ***Younger*** doctrine into the civil arena. In ***Middlesex County Ethics Comm. v. Garden State Bar Ass'n***, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982), the Court stated:

> The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.

In the context of non-criminal proceedings, the Court said that three factors should be considered: (1) whether there is a pending state proceeding; (2) whether the proceeding implicates important state interests; and (3) whether there is an adequate opportunity in the state proceeding to raise constitutional issues. *Id.*

In this case the Court of Appeals correctly concluded that all three factors exist. There is a pending state court proceeding. The proceeding implicates important state interests; the memorandum decision by the Court of Appeals referred to land use planning as such an interest. The case

implicates other important state interests, including a state-sanctioned mechanism for building public improvements, and bonds issued by the County to finance those improvements. Finally, Old Vail has had an adequate opportunity to raise its constitutional claim in the state proceeding, and in fact asserted the identical takings claim as in the district court and pursued that claim to the point of a judgment on the merits.

Indeed, Old Vail concedes that each of the ***Younger*** factors is present. Old Vail acknowledges that it filed suit in state court on the same day it filed in district court. *Petition* at 5-6. Old Vail allows that the state court proceeding "unequivocally touches and concerns a sensitive area of social policy" -- *i.e.*, an important state interest. *Id.* at 22. Finally, Old Vail admits that it has had the opportunity to assert its takings claim in state court and has in fact done so. *Id.* at 5-6.

Because Old Vail concedes that the ***Younger*** factors are present, Old Vail has failed to show that the Court of Appeals erred in ordering ***Younger*** abstention.

II. Pullman Abstention Would Not Be Proper Because There Is No Unsettled Issue Of State Law.

In its petition, Old Vail fails properly to analyze the nature of ***Pullman*** abstention and how that doctrine fits with the facts here. ***Pullman*** involved a constitutional challenge in district court to an order by the Texas Railroad Commission. 312 U.S. at 497-98, 61 S. Ct. at 644. A question arose in the case as to whether the Railroad Commission's order was within the powers granted under Texas law. 312 U.S. at 498-99, 61 S. Ct. at 644.

In the course of its decision the district court made a determination about Texas law -- which the Court characterized as a "forecast." 312 U.S. at 499, 61 S. Ct. at 645. The Court held that rather than make such a forecast, the district court should abstain until the state law issue could be decided in state court. 312 U.S. at 501-02, 61 S. Ct. at 645-46. If the state court determined that the Railroad Commission lacked the power to enter the challenged order, the constitutional issue would never arise. *Id.* In sum, ***Pullman*** stands for the proposition that where an unsettled question of state law may be resolved in a state proceeding so as to render unnecessary the constitutional issue, the district

court should abstain until the state law question is decided.

In its petition, Old Vail pays scant attention to the purpose of ***Pullman*** abstention, even though Old Vail insists that the doctrine should have been applied by the Court of Appeals. The only argument that Old Vail makes about any unsettled issue of state law is the following:

> Old Vail's taking claim does not involve interpretation of an [sic] single legislative enactment. Instead, the taking claim involves the synergistic effects of the County of Riverside specially assessing Old Vail's Property at a commercial rate while the City of Temecula down-zoned the Property from "Commercial" to "Office Professional" use; thereby destroying the Property's economic viability.

Petition at 23-24.

As seen above, Old Vail does not point to any unsettled state statute or regulation that might render adjudication of the takings claim unnecessary. Rather, Old Vail is arguing that the unsettled issue is the application of state law to a particular set of facts. Put another way, Old Vail is arguing that "if I win my state law claim I won't need to pursue my constitutional claim." An unresolved state law

claim, however, does not equate to an unsettled issue of state law under ***Pullman***. *Cf.* ***City of Houston v. Hill***, 482 U.S. 451, 467-68, 107 S. Ct. 2502, 2512-13, 96 L. Ed. 2d 398 (1987) (***Pullman*** abstention improper because the challenged city ordinance was unambiguous); ***Hawaii Housing Auth. v. Midkiff***, 467 U.S. 229, 230, 104 S. Ct. 2321, 2324, 81 L. Ed. 2d 186 (1984) (***Pullman*** abstention improper because the challenged state statute was unambiguous).

III. Pullman Abstention Would Not Be Proper Because Old Vail Has Voluntarily Litigated Its Takings Claim In State Court.

Old Vail's petition also fails to address that in applying ***Pullman***, the Court has held that the right to return to district court after the state law question is decided may be waived:

> [I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then -- whether or not he seeks direct review of the state decision in this Court -- he has elected to forgo his right to return to the District Court.

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419, 84 S. Ct. 461, 467, 11 L. Ed. 2d 440 (1964).

Old Vail has run afoul of the ***Engl***
litigating its takings claim to judgment in state co
than reserving the claim for disposition in the dist
action. Having litigated the takings claim in state
without reservation, Old Vail cannot now assert a
Pullman to bring the takings claim back to distri

CONCLUSION

The Court of Appeals properly or
Younger abstention because Old Vail's state cou
implicates important state interests, and Old Vail
its takings claim in that action.

Dated: September 19, 1997.

Respectfully submitted,

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No. 97-135

In The

Supreme Court of the United States

October Term, 1996

OLD VAIL PARTNERS,

Petitioner,

v.

COUNTY OF RIVERSIDE; CITY OF TEMECULA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION OF RESPONDENT COUNTY OF RIVERSIDE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), rather than *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941), to a California inverse condemnation litigant, filing concurrent state and federal actions, improperly forecloses, in violation of the Fifth Amendment to the U.S. Constitution, that litigant's access to the federal courts for the adjudication of a civil rights claim under 42 U.S.C. §§ 1983, 1985.

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INTRODUCTION

Petitioner, Old Vail Partners (hereinafter "Petitioner"), respectfully requests this Court to consider the following reply to the Opposition of Respondent, County of Riverside (hereinafter "Respondent"), in its determination to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") entered herein on March 10, 1997.

REASONS FOR REJECTING THE OPPOSITION

A. Respondent Fails To Address The Applicability Of Federal Abstention To Actions At Law Vis-a-vis Actions In Equity.

This Court has often recognized that federal courts have a strict duty to exercise the jurisdiction conferred upon them by Congress. (See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976) [finding that "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them"]; *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461 (1964) [recognizing that "[w]hen a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction"].)

The exercise of federal jurisdiction is circumscribed by the policies of comity articulated within the federal abstention doctrines. (See generally, *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501-502, 61 S.Ct. 643

(1941).) The implementation of these federal abstention doctrines, however, does not constitute a "technical rule of equity procedure". (*Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070 (1959).) Rather, the authority of a federal court to abstain from exercising its jurisdiction only extends to those cases in which the court has discretion to grant or deny relief. (*New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359, 109 S.Ct. 2506 (1989).) Thus, the application of the principles of abstention to actions "at law" only permits a federal court to enter a stay postponing adjudication of the dispute, not to dismiss the federal action. (*Quackenbush v. Allstate Insurance Co.*, ___ U.S. ___, 116 S.Ct. 1712 (1996); see also, *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. at 28-30.)

The complaint substantively seeks damages "at law" for a regulatory taking effectuated by the County of Riverside specially assessing its property at a "Commercial" rate, while the City of Temecula zoned the property for "Professional Office" use, i.e., a substantially more restricted use than "Commercial". The legal, as distinguished from the equitable, nature of Petitioner's claims renders the Ninth Circuit's relinquishment of jurisdiction under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971) inappropriate. (See, *In re United States Brass Corporation*, 110 F.3d 1261 (7th Cir. 1997) [interpreting effect of *Quackenbush* upon federal abstention].)

This Court should grant its writ of certiorari to explain that *Quackenbush* prohibits abstention under

either *Younger* or *Burford*[1] where a federal court plaintiff is prosecuting an action at law, rather than equity.

B. Petitioner's Claims Involve Unsettled Issues Of State Law.

Respondent's sole objection to the proposed application of *Pullman* involves a misguided analysis concluding that "*Pullman* Abstention Would Not Be Proper Because There Is No Unsettled Issue Of State Law". (Opposition at. p. 9.)

Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law. (*Pearl Investment Co. v. City & County of San Francisco,* 774 F.2d 1460, 1465 (9th Cir. 1985).) Resolution of an issue of state law might be uncertain if: (1) the statute at issue is ambiguous; (2) the precedents interpreting the statute conflict; or (3) a novel question of sufficient importance requires initial adjudication by the state court. (*Id.*)

Petitioner's claims involve "unsettled questions of state law". To illustrate, prior to the incorporation of Respondent City of Temecula, Respondent County of Riverside specially assessed Petitioner's Property at a "Commercial" rate in contemplation of its "Commercial" use. (California Streets and Highways Code §10000 et al.; see also, *Harrison v. Board of Supervisors of City of San Mateo*

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[1] *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943).

(1975) 44 Cal.App.3d 852, 857, 118 Cal.Rptr. 828 [recognizing that a mere "general benefit" inuring to the public as a whole will not justify a special assessment]; compare, *County of Fresno v. Malmstrom* (1979) 94 Cal.App.3d 974, 156 Cal.Rptr. 777 [finding that a special tax "need not . . . specifically benefit the taxed property" in the same manner as a special assessment].) Respondent City of Temecula, on the other hand, promulgated a general plan in conjunction with its incorporation as a California city, whereunder Petitioner's Property was restricted to a "Professional Office" use.

The juxtaposition of Respondent County of Riverside's special assessments vis-a-vis Respondent City of Temecula's restrictive zoning has created a quandary whereunder the maximum land use permissible under Respondent City of Temecula's general plan is insufficient to satisfy the special assessments levied by Respondent County of Riverside; thereby rendering the Property economically inviable. The regulatory taking arising from these incompatible regulations is an issue of first impression for the California courts. (*Georgevich v. Strauss*, 772 F.2d 1078, 1091 (3rd Cir. 1985) [recognizing that juxtaposition of otherwise clear statutes can create an independent ambiguity authorizing *Pullman* abstention]; see also, *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 157 Cal.Rptr. 684 [distinguishable on grounds that property owners petitioned for the formation of the assessment district].)[2]

---

[2] Contrary to Respondent's assertions, the state law proceedings do not have to entirely obviate the federal law issue. It is sufficient for purposes of *Pullman* that the state

C. Petitioner Has Not Waived Its Right Of Access To A Federal Forum.

Respondent erroneously asserts that Petitioner has waived its right to litigate its federal claims within a federal forum. (Opposition at p. 11.) These unsubstantiated assertions are incorrect for the following reasons:

1. Federal Precedence Requires The Employment Of State Inverse Condemnation Procedures.

It is well settled that the Fifth Amendment does not prohibit all takings, but merely takings unaccompanied by just compensation. To this end, an "as applied" challenge is unripe unless the plaintiff has sought "compensation through the procedures the State has provided for doing so." (*Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108 (1985); see also, *Jones Intercable v. City of Chula Vista*, 80 F.3d 320, 324 (9th Cir. 1996).)

An inverse condemnation litigant cannot avoid the prescripts of the abstention doctrines by refusing to raise its state claims within the federal forum. (*Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979); *Muskegon Theatres, Inc. v. City of Muskegon*, 507 F.2d 199, 204 (6th Cir. 1974).) Similarly, failure to raise all federal claims within the state forum may result in the

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proceedings narrow the federal issue[s]. (*Pearl Investment Company v. City and County of San Francisco*, 774 F.2d at 1464; *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 379 (9th Cir. 1983).)

waiver of the same. (See, *Schall v. Joyce,* 885 F.2d 101, 107 (3rd Cir. 1989); *Huffman v. Pursue, Ltd.* 420 U.S. 592, 611 n.22, 95 S.Ct. 1200 (1975).)

Petitioner has filed concurrent state and federal complaints in compliance with the federal precedential prescripts for protecting its access to a federal forum for the adjudication of its federal rights. (See, *Furey v. City of Sacramento,* 780 F.2d 1448 (9th Cir. 1986).) The Ninth Circuit, however, has broken with its prior precedence and prohibited Petitioner's right of access to a federal forum by dismissing the action under *Younger,* rather than simply issuing a stay under *Pullman.* (See e.g., *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401 (9th Cir. 1996); *Bank of America Nat. T&S v. Summerland City Water Dist.,* 767 F.2d 544 (9th Cir. 1985); *Pearl Investment Co. v. City and County of San Francisco,* 774 F.2d 1460 (9th Cir. 1985); *Kollman v. City of Los Angeles,* 737 F.2d 830 (9th Cir. 1984); *Isthmus Landowners Ass'n v. State of California,* 601 F.2d 1087 (9th Cir. 1979); *Newport Investments v. City of Laguna Beach,* 564 F.2d 893 (9th Cir. 1977); *Rancho Palos Verdes Corporation v. City of Laguna Beach,* 547 F.2d 1092 (9th Cir. 1976).

This Court should grant its writ of certiorari to explain that the instant invocation of *Younger* both: (1) conflicts the prior precedence of the Ninth Circuit; and (2) inequitably prohibits Petitioner's access to a federal forum for the adjudication of its federal rights.

2. Petitioner Has Not Litigated Its Federal Claims To Judgment In The State Court.

It is settled that a litigant must inform the state court of his federal claims, so that the state issues may be construed in light of the federal claims. (*England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420, 84 S.Ct. 461 (1964).)

Petitioner properly presented its federal claims within the state forum. Petitioner, however, did not freely litigate its federal claims with the state forum. Rather, all state and federal claims were dismissed without leave to amend on demurrer by Respondent. (California Code of Civil Procedure §430.10.) Thus, no evidence was received by the state court concerning any of Petitioner's state or federal claims. (See, *Vaillette v. Firemans' Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685, 22 Cal.Rptr.2d 807; *Rauber v. Herman* (1991) 229 Cal.App.3d 942, 280 Cal.Rptr. 785.)

D. Contrary To Respondent's Assertions, Petitioner Does Not Want "Two Bites Out Of The Apple".

It is well settled that a state court judgment commands the same res judicata effects in federal court as it does in the rendering state court. (*St. John v. Wisconsin Employment Relations Bd.*, 340 U.S. 411, 71 S.Ct. 375 (1951); *State Corp. Comm'n v. Wichita Gas Co.*, 290 U.S. 561, 569, 54 S.Ct. 321 (1934). Thus, to the extent the California courts adjudicate Petitioner's federal claims, the doctrine of res judicata will govern the disposition of the federal issues.

E. Respondent Cannot Negate Petitioner's Proper Choice Of A Federal Forum.

The abstention doctrines do not abrogate the rule that "[t]he right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." (*Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192 (1908); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 415.) Thus, to the extent Respondent intends to force the litigation of Petitioner's federal rights within a state forum, such tactic is inapposite to the holdings of this Court.

CONCLUSION

Petitioner respectfully requests the Court to grant this petition for certiorari.

Dated: September 26, 1997

Respectfully submitted,

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No. 97-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OLD VAIL PARTNERS

Petitioner,

v.

COUNTY OF RIVERSIDE AND
CITY OF TEMECULA

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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No. 97-135

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OLD VAIL PARTNERS

v. *Petitioner,*

COUNTY OF RIVERSIDE AND
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Respondents.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

I.
MOTION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received written consent to file this brief as amici curiae from the petitioner and from one of the respondents, the City of Temecula, and have filed the letters of consent with the Clerk of the Court.[1/] The other respondent, Riverside County, has not consented.

1/ This brief was authored in whole by counsel for the amici curiae. No one other than the amici curiae made any monetary contribution to the preparation or submission of this brief.

A. Motion To File An Amici Curiae Brief In Support Of The Petitioner

The NAHB and the BILD Foundation move this Court for leave to file their amici curiae brief in support of the petitioner because to date no party has cited the recent and pertinent—if not controlling—decision by this Court in *Quackenbush v. Allstate Insurance Co.*, ___U.S. ___, 116 S.Ct. 1712 (1996). Further, the petition fails to demonstrate that the decision in the case at bar is in conflict with decisions of other courts of appeals and the Ninth Circuit itself which is unwilling to provide the same access to federal courts for landowners and developers that it extends to convicted felons.

B. The Interests Of The Amici Curiae Arise From Their Members' Concerns As To Their Ability To Obtain Judicial Review In Federal Courts Of Actions By Municipalities Which Involve The Use Of Land

The NAHB represents over 190,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions in federal court.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California*

Coastal Commission, 483 U.S. 825 (1987)[2], and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The amici curiae submit this brief in support of the petitioner to assist the Court in determining whether to grant its writ of certiorari to decide if a federal district court is required to dismiss—as opposed to staying—an action involving the use of land merely because the federal court plaintiff is also the plaintiff in a similar state court proceeding.

II.

SUMMARY OF THE ARGUMENT

The position taken by the Court of Appeals for the Ninth Circuit—that federal courts have the right to dismiss an action otherwise properly before the court under *Younger v. Harris*, 401 U.S. 37 (1971), whenever a plaintiff files a similar action seeking only damages arising out of the regulation of land in both state and federal courts—is wrong and requires this Court's writ of certiorari to correct it because it conflicts with the holdings by this Court and other courts of appeal that (1) *Younger* abstention, which requires dismissal rather than a stay of the federal proceeding, does not apply where the federal court plaintiff seeks only damages and (2) *Younger* abstention does not apply where the federal court plaintiff is not a defendant in the state court proceeding.

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[2] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

III.

THIS COURT AND OTHER COURTS OF APPEALS HAVE HELD THAT *YOUNGER* ABSTENTION DOES NOT APPLY WHERE THE FEDERAL COURT PLAINTIFF SEEKS ONLY DAMAGES

A. The Ninth Circuit's Holding Is Contrary To This Court's Holding In *Quackenbush*

The Ninth Circuit in the case at bar applied *Younger* abstention without even considering the fact that Old Vail Partners was seeking damages for inverse condemnation and for violation of its rights under the 42 U.S.C. §§ 1983 and 1985 as a result of the actions taken by the City and the County. In doing so, the Ninth Circuit acted in complete contravention of this Court's recent holding in *Quackenbush:*

> "Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or discretionary." *Quackenbush, supra,* 116 S.Ct. at 1728.

This Court's opinion in *Quackenbush* noted that it had dealt with the important question of the relationship between federal and state courts in the important area of condemnation, pointing out that it had *affirmed* a district court's stay of eminent domain proceedings in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), while *reversing* the *dismissal* of a similar case in *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185 (1959). (116 S.Ct. at 1723.)

Quackenbush did not deal with *Younger* abstention; instead, it held that dismissal was improper under the abstention doctrine set forth in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). (*Quackenbush, supra*, 116 S.Ct. at 1717.) However, the opinion in *Quackenbush* cited and relied on *Younger* and its progeny in reaching its holding that federal courts had no

authority to dismiss an action which did not seek discretionary relief. (116 S.Ct. at 1721-1722.)

> "Nevertheless, we have not previously addressed whether the principles underlying our abstention cases would support the remand or dismissal of a common-law action for damages. Cf. *Deakins v. Monaghan*, 484 U.S. 193, 302, and n. 6, 108 S.Ct. 523, 529, and n. 6, 98 L.Ed.2d 529 (1988)(reserving the question whether *Younger* requires abstention in an action for damages); ..." *Quackenbush*, *supra*, 116 S.Ct. at 1722.

This Court should grant its writ of certiorari to explain that *Quackenbush* means that dismissal is unavailable where a federal court plaintiff is seeking damages under either *Younger* or *Burford*.

B. Federal Courts Are Split On The Reach Of *Quackenbush*.

Some courts have read *Quackenbush* to mean that dismissal is not permissible under *Younger* where only nondiscretionary damages—as opposed to discretionary equitable or declaratory relief—are sought. See, *e.g.*, *Warmus v. Melahn*, 110 F.3d 566 (8th Cir. 1997), where the court held that a damage action was not subject to dismissal under *Younger* after *Quackenbush*.

In *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996), the court, citing *Quackenbush*, noted in dictum "[i]t is doubtful that federal district courts may dismiss claims for damages under abstention principles." (95 F.3d at 1552 n.12.)

On the other hand, some courts have held that dismissal under *Younger* is proper

> "... where the damages sought cannot be awarded without first declaring unconstitutional a state court judgment on a matter firmly committed to the states." *Amerson v. State of Iowa*, 94 F.3d 510, 513 (8th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 696 (1996)(domestic relations).

See also *Moran v. Connecticut Department of Public Health*, 954 F.Supp. 484 (D. Conn 1997), where the court, relying on *Amerson*, dismissed a damage action under *Younger* because the award of damages would require an analysis of the constitutional validity of administrative proceedings stripping the plaintiff of his license to practice medicine. (954 F.Supp. at 488.)

This Court should grant its writ of certiorari to instruct the lower federal courts on *Quackenbush's* reach.

C. Other Courts Of Appeals Have Uniformly Held That The Proper Procedure Where Only Damages Are Sought Is To Stay—Rather Than To Dismiss—Federal Actions Where *Younger* Might Otherwise Apply

The Ninth Circuit's position is contrary to the positions of other courts of appeals. Pre-*Quackenbush* cases had uniformly held that a stay, rather than dismissal, was the proper response where *Younger* might otherwise apply but only damages were being sought. See, e.g., *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 16 n.1 (1st Cir. 1992); *Giulini v. Blessing*, 654 F.2d 189, 193-194 (2d Cir. 1981); *Williams v. Hepting*, 844 F.2d 138, 144 (3d Cir. 1988); *Lewis v. Beddingfield*, 20 F.3d 123, 125 (5th Cir. 1994); *Carras v. Williams*, 807 F.2d 1286, 1291-1292 (6th Cir. 1986); and *Doby v. Strength*, 758 F.2d 1405, 1406 (11th Cir. 1985).

This Court should grant its writ of certiorari to instruct the lower federal courts that *Quackenbush* means that a federal action should be stayed—but not dismissed—where the plaintiff is not seeking discretionary equitable or declaratory relief even if *Younger* might otherwise apply.

IV.
THIS COURT AND OTHER COURTS OF APPEALS HAVE HELD THAT *YOUNGER* ABSTENTION IS NOT APPLICABLE WHEN THE FEDERAL COURT PLAINTIFF IS ALSO THE STATE COURT PLAINTIFF

Every single one of the cases involving abstention under *Younger* decided by this Court has been marked by the same fact pattern: the federal *plaintiff* was seeking to enjoin state proceedings in which he or she was a *defendant.*

Initially, under *Younger* and the cases immediately following it, abstention was required in cases where a state court defendant in a criminal prosecution sought, as a federal court *plaintiff*, to have the state court prosecution enjoined. *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971); and *Kugler v. Helfant*, 421 U.S. 117 (1975).

This Court then extended *Younger* to those situations where the federal court plaintiff was a defendant in a state court civil proceeding and was seeking to enjoin that proceeding. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Trainor v. Hernandez*, 431 U.S. 434 (1977); and *Moore v. Sims*, 442 U.S. 415 (1979).

This Court next extended *Younger* to those situations where the federal court plaintiff was a state court defendant seeking to enjoin the use of state court enforcement methods being brought against him. *Juidice v. Vail*, 430 U.S. 327 (1977); and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

Finally, this Court extended *Younger* to those situations where the federal court plaintiff was the defendant in state administrative proceedings and was seeking to enjoin the continuation of those proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982); and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

Other courts of appeals have recognized that *Younger* abstention does not apply where the federal court plaintiff is also the state court plaintiff. See, *e.g., Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111, 1117 (3d Cir. 1986), and *Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984). Indeed, the Ninth Circuit distinguished *Crawley* in *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1360 n.8 (9th Cir. 1986), when it stated:

> "Although *Younger* abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court, *see Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984), it applies here, because the judicial proceeding filed by [the federal court plaintiff] was not truly voluntary; [the federal court plaintiff] petitioned for review only because the Board initiated agency proceedings and entered an order against the company."

This Court should grant its writ of certiorari to explain that *Younger* can apply only when the federal court plaintiff is a defendant in a state proceeding.

V.

THE NINTH CIRCUIT LIMITS *YOUNGER* ABSTENTION TO CASES INVOLVING THE REGULATION OF LAND

The Ninth Circuit has, for whatever reason, set up a dichotomy in the treatment of cases involving rights of owners and developers of real property and other rights. It uses a number of mechanisms to keep cases involving real property out of the federal courts in the Ninth Circuit. For example, it is impossible to allege that governmental action regulating land use violates the promise of substantive due process guaranteed by the Fourteenth Amendment; instead, such an action must be brought as a takings case which must then be tried in state

court. *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997); *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1986); and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Even where a facial attack is brought contending that a taking has occurred and the federal courts have jurisdiction, the Ninth Circuit demands that the district courts abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). *Sinclair Oil Corp., supra*. On the other hand, the Ninth Circuit will go further in other contexts and find constitutionally protected rights where none exist. See, *e.g., Compassion In Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995), *rev'd sub nom State of Washington v. Glucksberg*, ___ U.S. ___, 117 S.Ct. 2258 (1997) (constitutionally protected right to doctor assisted suicide).

All of this is directly contrary to the position taken by this Court in its decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which reaffirmed the importance of the Fifth Amendment:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan, supra*, 512 U.S. at 392.

The Ninth Circuit has no problem in holding that a federal court plaintiff who is also a state court plaintiff who is suing for damages because of a misuse of the state criminal system is not going to have his federal court action for damages dismissed under *Younger*. See *Martinez v. Newport Beach City*, ___ F.3d ___, 97 Daily Journal D.A.R. 11739 (9th Cir., Docket No. 95-56866, September 10, 1997), where the Ninth Circuit reviewed its past cases involving similar situations and concluded that dismissal under *Younger* was contrary to Ninth Circuit precedent. However, it failed to cite its contrary decision in a case involving facts very similar to the case at bar,

Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

How can the Ninth Circuit allow a convicted felon who is seeking damages the right to judicial review in federal courts but deny the same right to a landowner or developer? The answer is that it can't and that it shouldn't be allowed to.

VI.

CONCLUSION

Quackenbush should have settled the question of whether dismissal is proper in the land use context where *Younger* abstention would otherwise be available but the federal court plaintiff is not seeking discretionary relief. As demonstrated by the Ninth Circuit's decision in the case at bar, it did not. Unfortunately, to some courts, "the applicability of *Younger* abstention to ... monetary claims is unclear." *Hirsch v. Justices of the Supreme Court of the State of California,* 67 F.3d 708, 715 n.5 (9th Cir. 1995).

The stakes involved—the general applicability of *Younger* and the particular treatment of the rights of landowners and developers—are too high to be left to the whim of individual courts. Landowners and developers have the right to have their claims that municipalities have violated their federally-constitutionally-protected property rights heard in federal courts. As pointed out in the petition for certiorari, that can happen only where actions for just compensation are first brought in state courts. Landowners and developers should not be deprived of the right to have their claims heard in federal courts because of a rule adopted by this Court in another context and now misapplied by the Ninth Circuit.

The guidance needed by the Ninth Circuit and other lower federal courts in order to deal fairly with landowners and developers can only can be provided if this Court issues its writ of certiorari to the Court of Appeals for the Ninth Circuit.

The NAHB and the BILD Foundation ask that it do so.

DATED: September 19, 1997

Respectfully submitted,

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